

PLR 200209015, 2002 WL 323590 (IRS PLR)

Internal Revenue Service (I.R.S.)

Private Letter Ruling

Issue: March 1, 2002

November 26, 2001

Section 451 -- General Rule for Taxable Year of Inclusion (Year Received v. Not Year Received)

451.00-00 General Rule for Taxable Year of Inclusion (Year Received v. Not Year Received)

Section 671 -- Trust Income, Deductions, and Credits Attributable to Grantors and Others As Substantial Owners

671.00-00 Trust Income, Deductions, and Credits Attributable to Grantors and Others As Substantial Owners

671.02-00 Persons Treated as Grantors

Section 676 -- Power to Revoke

676.00-00 Power to Revoke

CC:PSI:B02-PLR-130593-00

Trust =

Tribe =

Tribal Gaming Procedures =

x =

Dear *** :

This responds to a letter dated December 1, 2000, and subsequent correspondence, written on behalf of the Tribe, requesting a ruling under [§ 676 of the Internal Revenue Code](#).

The information submitted states that the Tribe is a federally recognized tribal government with sovereign authority over its governmental affairs. The Tribe constitutes an Indian tribal government under § 7701(a)(40).

In addition to basic government services, the Tribe also conducts Class II and Class III gaming operations on tribal trust land pursuant to the Indian Gaming Regulatory Act, [25 U.S.C. § § 2701](#), et seq. and the Tribal Gaming Procedures. Integrated with the gaming operations, the Tribe operates hotels, restaurants, retail shops, a theater, and sports entertainment. Generally, income from gaming is the primary source of funding for the Tribe's basic government services.

The Tribe intends to create Trust to provide a stable and secure source of funds to insure the long-term security of the Tribe and its members, separate from its business enterprises.

The Finance Committee of the Tribe has passed a Resolution recommending that the Tribal Council establish Trust. Trust was then presented to the Tribal Council, the Tribe's elected governing body, for approval. The Tribal Council passed a Resolution approving the establishment of Trust, pending Tribal Membership approval. The Tribal Membership approval will be sought within 60 days of receipt of this private letter ruling.

Trust will be funded with such property as is transferred to it from time to time. It is anticipated that such property will be transferred to Trust by the Tribe. Section 1 of the Trust Agreement provides that Trust shall consist of any property transferred to Trust

from time to time by the Tribe, but from no other source whatsoever.

Section 2 of the Trust Agreement provides that Trust shall be perpetual and shall have no termination date, except as otherwise provided in section 9 of the Trust Agreement.

Section 3 of the Trust Agreement provides that no distribution shall be made from Trust prior to the first day of the fiscal year following the later of (i) the first fiscal year-end date upon which the fair market value of Trust assets equals or exceeds \$x, or (ii) ten years from the date of Trust's initial funding, referred to as the "Initial Distribution Year."

During the Initial Distribution Year and in each succeeding fiscal year, the trustees may distribute to the Tribe and/or the adult Tribal Members, trust property having a fair market value not exceeding the Available Distribution Amount, as defined in the Trust Agreement, recomputed annually. The Available Distribution Amount shall be equal to fifty percent of the average annual total return of Trust assets for the preceding five fiscal years plus any undistributed portion of the Available Distribution Amount from prior years which the trustees previously reserved for possible future distribution.

In determining what portion, if any, of the Available Distribution Amount to distribute in a given fiscal year, the trustees shall adhere to the following procedures:

(A) First, the trustees shall consider any written application received by the trustees from the Tribal Council requesting a distribution of a certain dollar amount to the Tribe from the current Available Distribution Amount, such funds to be used for the general welfare of the Tribe and its Members. To assist the trustees in their review of such application, the Tribal Council shall provide a detailed explanation of the proposed use of the requested funds, together with such other information as the trustees may deem pertinent, including financial budgets and an accounting of the prior year's distribution to the Tribe, if any, from that year's Available Distribution Amount. The trustees shall determine in their sole and absolute discretion what portion, if any, of the current Available Distribution Amount to distribute to the Tribe.

(B) Second, after providing for any distribution to the Tribe under Section 3 Paragraph (A) of the Trust Agreement, the trustees shall determine in their sole and absolute discretion what portion, if any, of the remaining current Available Distribution Amount to distribute to the adult Tribal Members. Any funds which the trustees decide to distribute to the adult Tribal Members shall be distributed on a per capita basis to all adult Tribal Members who are deemed by the Tribal Council to be in good standing as of the designated distribution date.

(C) Third, to the extent that the total Available Distribution Amount is not otherwise distributed in a given fiscal year, the trustees shall determine in their sole and absolute discretion what portion, if any, of the undistributed funds shall be reserved for possible future distributions as part of the Available Distribution Amount in future years and what portion, if any, shall be permanently reinvested in the trust property.

Section 4 of the Trust Agreement provides that in exercising their discretion concerning distributions of the Available Distribution Amount, the trustees shall consider the use of the distributed trust property for one or more of the following purposes: (A) to fund Tribal government operations or programs; (B) to provide for the general welfare of the Tribe and its Members; and (C) to promote Tribal economic development.

Section 5.1 of the Trust Agreement provides that Trust at all times shall have five trustees, who shall be as follows: (A) the then acting Treasurer of the Tribal Council; (B) one member of the Elders Council to be appointed by the Elders Council; and (C) three independent trustees to be appointed by the Tribal Council. The term "independent trustees" shall mean any individuals or institutions legally empowered to act, who, or which, are not otherwise directly or indirectly connected with or presently compensated by the Tribe.

Section 6.1 of the Trust Agreement provides that all decisions concerning the administration, investment and distribution of the trust property shall require an affirmative vote of at least three trustees. A trustee shall be exculpated from any liability resulting from a decision with respect to which such trustee was absent or has dissented if such trustee promptly files a written notice of such trustee's absence or dissent with the Tribal Council.

Section 8 of the Trust Agreement provides that the Trust Agreement shall be governed by the laws of the Tribe, and the Tribal Court System shall have jurisdiction over Trust and the trustees, as it would over any other inter vivos trust and its trustees.

Section 9 of the Trust Agreement provides that the Trust Agreement may be amended at any time and from time to time or terminated at any time, but only if the following votes approving such amendment or termination have been obtained: (A) at least two-thirds vote of the entire Tribal Council approving any proposed amendment or termination at a duly called meeting of the Tribal Council; (B) followed within ninety days from the Tribal Council's affirmative vote by at least two-thirds vote of the Elders present at a duly called meeting of the Elders Council approving such proposed amendment or termination; and (C) followed within ninety days from the Elders Council's affirmative vote by at least two-thirds vote of the eligible voters of the Tribe approving such proposed amendment or termination at a duly called Tribal Membership meeting.

Upon obtaining the required votes for a trust amendment, such amendment shall become effective. Upon obtaining the required votes to terminate Trust within the requisite time period, Trust shall terminate, and the trustees shall distribute all remaining trust property to the Tribe in a timely manner.

Section 10.6 of the Trust Agreement provides that no beneficiary shall have the power in any manner to anticipate, charge or encumber any of his, her or its interests under Trust while in the possession of the trustees. No interest of any beneficiary of Trust shall be subject to pledge, assignment, sale or transfer in any manner, and no such interest shall be liable or subject in any manner for debts, contracts, liabilities or torts of any beneficiary.

Section 451(a) and [§1.451-1\(a\) of the Income Tax Regulations](#) provide that gains, profits and income are to be included in gross income for the taxable year in which they are actually or constructively received by the taxpayer unless includible for a different year in accordance with the taxpayer's method of accounting.

Section 1.451-2(a) provides that a taxpayer constructively receives income in the taxable year during which it is credited to his account, set apart for him, or otherwise made available so that he may draw upon it at any time, or so that he could have drawn upon it during the taxable year if notice of intention to withdraw had been given. However, income is not constructively received if the taxpayer's control of its receipt is subject to substantial limitations or restrictions

In order to tax an amount by reason of constructive receipt, the amount must be subject to the unqualified demand of the individual who is to be taxed. [Robinson v. Commissioner, 44 T.C. 20 \(1965\)](#); [Basila v. Commissioner, 36 T.C. 111 \(1961\)](#) acq., 1962-1 C.B. 3; [Oates v. Commissioner, 18 T.C. 570 \(1952\)](#), aff'd, [207 F.2d 711 \(7th Cir. 1953\)](#); [Veit v. Commissioner, 8 T.C. 809 \(1947\)](#), acq., 1947-2 C.B. 4.

Amounts held by Trust will not be credited to the account of any individual member of the Tribe and will not be subject to unqualified demand of any individual member of the Tribe. There is no provision for any distribution from Trust during the 10 year period following the initial funding of Trust. Trust distributions during subsequent periods will be made at the sole and absolute discretion of the trustees. No individual member of the Tribe will have the ability to reduce amounts held by Trust to his possession. Accordingly, the amounts held by Trust will not be taxable to the members of the Tribe by reason of constructive receipt.

The economic benefit doctrine requires a determination that the actual receipt of property or the right to receive property in the future confers a current economic benefit on the recipient. Economic benefit applies when assets are unconditionally and irrevocably paid into a fund or trust to be used for a taxpayer's sole benefit. [Sproull v. Commissioner, 16 T.C. 244 \(1951\)](#), aff'd per curiam, 195 F.2d 541 (6th Cir. 1952); [Rev. Rul. 60-31, 1960-1 C.B. 174 \(Situation 4\)](#).

In *Sproull*, the court applied the economic benefit doctrine to tax amounts an employer paid to an interest bearing trust as compensation for an employee's past services. No one other than the employee had any interest in or control over the monies in the trust. The employee was required to take no further action to earn or establish his rights to the

amounts in trust. The trustee's duties were limited to holding, investing, and paying the amounts in trust to the employee or his estate in the event of his prior death in the two taxable years following the creation of the trust. The Tax Court held that "there is no doubt that such an interest had a value equivalent to the amount paid over for his benefit." [Sproull, 16 T.C. at 248.](#)

In [Pulsifer v. Commissioner, 64 T.C. 245 \(1975\)](#), a minor was held taxable on winnings from the Irish Sweepstakes in the year the winnings were deposited in an interest bearing bank account for the minor's benefit. The funds, including interest, were to be held in the account until the minor reached age 21 or the minor's legal representative applied for release of the funds on the minor's behalf.

In the circumstances involving Trust to be created by the Tribe, no member of the Tribe will receive an interest in Trust or a right to receive distributions from Trust. No amounts held by Trust will be held or used solely for the benefit of any individual member of the Tribe. No member of the Tribe has a right to, or any assurance of receiving, any property held by Trust. Even if the trustees decide to make distributions from Trust, an adult member of the Tribe must be deemed by the Tribal Council to be in good standing as of the designated distribution date in order to be eligible to receive a distribution. The information provided does not indicate the circumstances which would preclude a member from being in "good standing". If an adult member of the Tribe dies during the 10-year period following the initial funding of Trust or prior to the time the trustees decide to make a distribution from Trust, the deceased member's estate would have neither a right to a distribution from Trust nor an interest in Trust.

Based on the considerations indicated above, amounts held by Trust will not be taxable under the economic benefit doctrine to the adult members of the Tribe.

Section 671 provides that where it is specified in §§ 673 through 678 that the grantor or another person shall be treated as the owner of any portion of a trust, there shall be included in computing the taxable income and credits of that person those items of income, deduction, and credits against tax of the trust which are attributable to that portion of the trust to the extent that such items would be taken into account in computing taxable income or credits against the tax of an individual.

Section 1.671-2(e)(1) provides that for purposes of part I of subchapter J, chapter 1 of the Internal Revenue Code, a grantor includes any person to the extent such person either creates a trust, or directly or indirectly makes a gratuitous transfer (within the meaning of § 1.671-2(e)(2)) of property to a trust. For purposes of § 1.671-2, the term *property* includes cash.

Section 1.671-2(e)(2)(i) provides that a gratuitous transfer is any transfer other than a transfer for fair market value.

Section 1.671-2(e)(2)(ii) provides that for purposes of § 1.671-2(e), a transfer is for fair market value only to the extent of the value of property received from the trust, services rendered by the trust, or the right to use property of the trust.

[Section 676\(a\)](#) provides that the grantor shall be treated as the owner of any portion of a trust, whether or not he is treated as such owner under any other provision of part I of subchapter J, chapter 1 of the Code, where at any time the power to revest in the grantor title to such portion is exercisable by the grantor or a nonadverse party, or both.

Section 1.676(a)-1 provides that if a power to revest in the grantor title to any portion of a trust is exercisable by the grantor or a nonadverse party, or both, without the approval or consent of an adverse party, the grantor is treated as the owner of that portion, except as provided in [§ 676\(b\)](#) (relating to powers affecting beneficial enjoyment of income only after the expiration of certain periods of time). If the title to a portion of the trust will revest in the grantor upon the exercise of a power by the grantor or a nonadverse party, or both, the grantor is treated as the owner of that portion regardless of whether the power is a power to revoke, to terminate, to alter or amend, or to appoint.

Section 672(a) provides that for purposes of subpart E, part I, subchapter J, chapter 1 of the Code, the term "adverse party" means any person having a substantial beneficial interest in the trust which would be adversely affected by the exercise or nonexercise of

the power which he possesses respecting the trust.

Section 672(b) provides that for purposes of subpart E, the term "nonadverse party" means any person who is not an adverse party.

Under section 9 of the Trust Agreement, the Tribe, which will be the grantor of Trust, through the Tribal Council and the Elders Council, and with the consent of two-thirds of the eligible voters of the Tribe, has the power to terminate Trust and revest the trust assets in the Tribe. Under section 3 of the Trust Agreement, as of the Initial Distribution Year and prior to termination, the adult Tribal Members may receive a distribution from Trust. However, any distribution from Trust to the Tribal Members is to be made at the complete discretion of the trustees, who must first consider making a distribution to the Tribe before making a distribution to the adult Tribal Members individually. A distribution decision requires the vote of at least three of the five trustees and at least three of the trustees must be independent. Only adult Tribal Members who are deemed by the Tribal Council to be in "good standing" as of the designated distribution date may receive a distribution. Furthermore, under section 10.6 of the Trust Agreement, the Tribal Members may not in any manner anticipate, charge, encumber, pledge, assign, sell or transfer their interests under Trust. Accordingly, based on the facts and circumstances, the Tribal Members do not have a substantial beneficial interest in Trust and are not treated as adverse parties under § 672(a). Therefore, the Tribal Members are nonadverse parties for purposes of § [§ 672\(b\)](#) and [676\(a\)](#). See *Water Resource Control v. Commissioner*, 191-104 T.C.M. (P-H) ¶ 91,104 (1991); [Fulham v. Commissioner, 110 F.2d 916 \(1st Cir. 1940\)](#).

Accordingly, based on the information submitted and representations made, we conclude that the Tribe will be treated as the owner of Trust under [§ 676](#) because the Tribe and nonadverse parties may terminate Trust and revest the assets in the Tribe. Furthermore, the Tribe, which is not subject to federal income tax, shall not be subject to federal income tax on the income of Trust. The Tribal Members will include in gross income any amounts distributed to them in the taxable year of distribution from Trust. [Rev. Rul. 94-16, 1994-1 C.B. 19](#); [Rev. Rul. 67-284, 1967-2 C.B. 55](#).

Except as specifically set forth above, no opinion is expressed concerning the federal tax consequences of the facts described above under any other provision of the Code.

This ruling is directed only to the taxpayer who requested it. Section 6110(k)(3) provides that it may not be used or cited as precedent.

Pursuant to a power of attorney on file with this office, a copy of this letter is being sent to X's authorized representative.

Sincerely yours,

J. Thomas Hines

Chief, Branch 2

Office of the Associate Chief Counsel (Passthroughs and Special Industries)

Enclosures: 2

Copy of this letter

Copy for § 6110 purposes

This document may not be used or cited as precedent. [Section 6110\(j\)\(3\) of the Internal Revenue Code](#).

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